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No. 77-1254

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**In the Supreme Court of the United States**

OCTOBER TERM, 1978

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CYRUS R. VANCE, SECRETARY OF STATE, ET AL.,  
APPELLANTS

v.

HOLBROOK BRADLEY, ET AL.

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On Appeal from the United States District Court  
for the District of Columbia

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**MOTION FOR LEAVE TO FILE AS AMICI CURIAE  
AND BRIEF AMICI CURIAE**

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FOR HON. CLAUDE PEPPER, HON. EDWARD R. ROYBAL,  
HON. FRED B. ROONEY, HON. MARIO BIAGGI, HON. JOHN  
L. BURTON, HON. JOHN PAUL HAMMERSCHMIDT, HON.  
CHARLES E. GRASSLEY, HON. MATTHEW J. RINALDO,  
MEMBERS OF CONGRESS AS AMICI CURIAE

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UNITED STATES

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PAUL HAMMERSCHMIDT, HON. CHARLES E.  
GRASSLEY, HON. MATTHEW J. RINALDO FOR  
LEAVE TO FILE BRIEF AMICI CURIAE

MEMBERS OF CONGRESS AS AMICI CURIAE

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Pursuant to Rule 42(3) of the Rules  
of this Court, Hon. Claude Pepper, Hon.  
Edward R. Roybal, Hon. Fred B. Rooney, Hon.  
Mario Biaggi, Hon. John L. Burton, Hon.  
John Paul Hammerschmidt, Hon. Charles E.  
Grassley, Hon. Matthew J. Rinaldo  
respectfully move the Court for leave to

file a brief amici curiae in the above entitled case. Counsel for appellants has denied movants' request to file brief of amici curiae; the appellees have granted their consent.

#### INTEREST OF AMICI

Amici are members of Congress with a unique interest in the fairness and efficiency of the Federal Government. Amici are also members of the Select Committee on Aging which has been mandated by the House of Representatives to study and review the problems of older Americans, including the problems of income maintenance and employment.

Representative Claude Pepper, in addition to chairing the Committee on Aging, was the principal sponsor and co-manager for floor consideration of the bill which became the Age Discrimination in Employment (ADEA) Amendments of 1978, Pub. L. 95-256, 92 stat. 189.

Amici as members of Congress have day-to-day experience in the process of legislation: discerning problems with legislative solutions, developing legislation to ameliorate such problems, and obtaining the prerequisite votes to enact the necessary legislation. From this perspective, they can uniquely address the legislative intent underlying the Acts of Congress discussed in appellants' brief. Moreover, amici are singularly placed to address the broader interest of persons affected by mandatory retirement requirements in general, issues regarding which

are raised by the instant appeal.

It is to bring this unique perspective in addressing the issues raised herein that has prompted amici to file this motion seeking leave to file its amici curiae brief.

Amici respectfully request the leave of this Court to file a brief amici curiae presenting their views of the important issues raised herein.

Respectfully Submitted,

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September 22, 1978

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SECTION IS UNCONSTITUTIONAL SHOULD NEVERTHELESS BE SUSTAINED, SINCE THE NATURE OF THE CLASSIFICATION AND THE INTEREST BEING PROTECTED IN THIS CASE JUSTIFY A HEIGHTENED DEGREE OF SCRUTINY IN EXAMINING CLAIMS OF DUE PROCESS DENIAL.

- A. Although this Court has often referred to a two-tiered approach to statutory classifications claimed to deny equal protection of the laws, that approach has not precluded varying degrees of scrutiny short of the "strict scrutiny" required when fundamental rights or suspect classifications are involved.
- B. The District Court was not required, as it did, to treat the issue as one allowing only the deferential scrutiny of the minimal rationality standard, but could properly have applied stricter scrutiny.
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PRELIMINARY STATEMENT

In accordance with Rule 42 of the  
Rules of this Court, this brief amici  
curiae is filed in support of the position  
of appellees, pursuant to a timely motion  
for leave to file such brief.

## QUESTION PRESENTED

Whether Section 632 of the Foreign Service Act of 1946, which requires participants in the Foreign Service Retirement System to retire at age 60, violates the equal protection guarantees embodied in the Due Process Clause of the Fifth Amendment.

## STATEMENT OF INTEREST

Amici are members of Congress concerned both with fair treatment of older employees of the Federal Government and with the efficient functioning of the Department of State and the International Communications Agency (ICA).

All amici are also members of the Select Committee on Aging, created by vote of the House of Representatives in 1974 with jurisdiction, among other duties, "to conduct a continuing comprehensive study and review of the problems of the older American, including but not limited to income maintenance...[and] employment...."<sup>1/</sup>

Rep. Pepper chairs the Committee, and its Subcommittee on Health and Long-term Care. Rep. Rooney chairs the Subcommittee on Retirement Income and Employment. Rep. Roybal chairs the Subcommittee on Housing

<sup>1/</sup> Rule 10, Clause 6, Rules of the House of Representatives, 95th Cong., 1st Sess. (1977).

and Consumer Interests, and Rep. Hammer-schmidt is the Subcommittee's Ranking Minority Member. Rep. Biaggi chairs the Subcommittee on Human Services.

Rep. Pepper, in addition to chairing the Committee on Aging, was the principal sponsor, and co-manager for floor consideration, of the bill <sup>2/</sup> which became the Age Discrimination in Employment (ADEA) Amendments of 1978, Pub. L. 95-256, 92 Stat. 189.

Through hearings, reports and recommendations, the Select Committee on Aging has conducted an ongoing inquiry into discrimination on the basis of age in federal, other governmental and private employment. <sup>3/</sup>

<sup>2/</sup> H.R. 5383, 95th Cong., 1st Sess. (1977).

<sup>3/</sup> See, e.g., Age and Sex Discrimination in Employment and Review of Federal Response to Employment Needs of the Elderly: Hearing Before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 1st Sess. (1975); Impact of the Age Discrimination in Employment Act of 1967: Hearings Before the Subcommittee on Retirement Income and Employment of the House Select Committee on Aging, 94th Cong., 2d Sess. (1976); House Select Committee on Aging, 94th Cong., 2d Sess. (1976), Funding of Federal Programs for Older Americans (Comm. Print); Retirement Age Policies (two parts): Hearings Before the House Select Committee on Aging, 95th Cong., 1st Sess. (1977).

We believe that no defensible purpose is served by forcing the retirement of those covered by the Foreign Service Retirement System solely because of the attainment of an arbitrary age.

We believe more generally that mandatory retirement persists in our society principally because of myths and stereotypes about older people. Principal among these is that there is some precipitous decline in ability as some magic chronological marker is passed. As we intend to show below, our inquiries have substantiated that the opposite is true: that chronological age is not a good predictor of occupational competence. Another persistent myth posits massive administrative problems if older workers are not forced out at a specific age. We must ask, as our Committee asked in its 1977 report on mandatory retirement, "Why, when administrators must every day evaluate the competency of the younger worker, does that task become so onerous when the worker reaches 65?" 4/

Finally, we view as pernicious the notion that a younger worker has the right to an older worker's job simply because he or she is younger. As our Committee observed in its report,

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4/ House Select Committee on Aging, 95th Cong., 1st Sess. (1977), Mandatory Retirement: The Social and Human Cost of Enforced Idleness 35 (Comm. Print).

[T]he ethical or social grounds for arguing that a younger person has more right to a job than an older person seem non-existent. The mentality that would rob jobs from the old to give to the young apparently assumes that, given a choice between young and old, the elderly should suffer. Id. at 36.

We believe that the mandatory retirement age for those under the Foreign Service Retirement System reflects the myths described above. We agree with appellees and the district court that, since the policy is rationally indefensible, it must fall before the equal protection guarantees embodied in the Due Process Clause of the Fifth Amendment.

It is to present this Court with our unique views on this matter that we file this brief.

#### SUMMARY OF ARGUMENT

The mandatory retirement age of 60 established for Foreign Service personnel by Section 632 of the Foreign Service Act of 1946 differs markedly from the mandatory retirement age of 70 imposed on most Civil Service employees. The district court in this case held that this distinction, since it was not supported by a rational basis, was unconstitutional.

1. We submit that a careful examination of the fifty-four year legislative history of the Foreign Service and its

predecessors yields nothing that contradicts the district court's finding, especially as it bears on the contention that the "rational basis" for the earlier retirement age lay in the unique rigors of the duties these persons must perform. Indeed, the most reasonable conclusion to be drawn from this legislative history is that, until very recently, Congress did not focus on the policy issues inherent in setting a particular mandatory retirement age. When the matter began to attract attention, the first tangible legislative result was enactment of a law to liberalize mandatory retirement ages, and to abolish them completely for most federal employees.

Appellants' reliance on the latest legislation is misplaced. That the mandatory retirement age set in Section 632 remained intact is a reflection, not of a policy judgment about the correctness of that age for Foreign Service forced retirement, but rather a desire by proponents of the legislation to expedite its enactment.

Another striking aspect of the legislative history of Section 632 is that nowhere could factual data be found to substantiate the claims of rationality now made in its behalf.

2. Even if this Court decides that Section 632 withstands the "minimum rationality" test, district court's decision should stand.

The "strict scrutiny" test, where denial of due process is claimed, is reserved for the protection of fundamental rights, or in cases where suspect classifications are involved. It is well settled that the right to a government job is not "fundamental," and this Court has held that age is not a suspect classification. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307.

However, as the right involved becomes more important, if not fundamental, and the classification involves discrimination based on outmoded stereotypical notions about the members of the class, a standard of heightened scrutiny, beyond minimum rationality, is appropriate.

When judged against this more appropriate benchmark, the rational basis suggested by appellants as underpinning for the lower mandatory retirement age is singularly wanting.

Murgia does not, we submit, compel a result different from the district court's holding. The finding that certain physical aspects of aging, documented by the employer, provided a rational basis for retiring uniformed law enforcement officers at an early age does not preclude a different conclusion when the work involved is intellectual rather than physical, and when scant evidence is proffered to substantiate the claim that the ability to fulfill certain duties declines with age.

Our examination of the legislative history of the Foreign Service Act yielded

only slight references to the mandatory retirement provision, and those references were either vague or conclusory.

Particularly under this standard of heightened scrutiny, which is a proper one, Section 632 cannot survive.

#### ARGUMENT

##### I

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT SECTION 632 OF THE FOREIGN SERVICE ACT OF 1946, AS AMENDED, WHICH REQUIRES FOREIGN SERVICE EMPLOYEES TO RETIRE AT AGE 60, HAS NO RATIONAL BASIS AND IS THEREFORE AN UNCONSTITUTIONAL DENIAL OF DUE PROCESS.

##### A.

Section 632 has no rational basis supportable by the facts and circumstances involved in this case.

Respecting this argument, amici curiae concur fully upon the matters set out and discussed in the brief of appellees, respectfully pray that they be incorporated in this brief.

##### B.

Section 632 is not supported by any determination of the Congress that mandatory retirement at age 60 of Foreign Service Employees is rationally required because of the uniquely demanding nature and circumstances of service in that agency.

1. Appellants are in error in contending that the Congressional rationale for establishing a mandatory retirement age of 65 in the Act that in 1924 created the Foreign Service was that such retirement was required because Foreign Service Officers were rotated among remote posts overseas and frequently experienced disruptive changes in their way of life.

Appellants contend the reason that Congress has mandated a lower retirement age for Foreign Service employees than for Civil Service employees is that Foreign Service work is uniquely demanding Gov. Br. at 12. In support of this assertion, appellants discuss the legislative history of the Foreign Service Act of 1924 5/, which established a mandatory retirement age of 65 for Foreign Service Officers in contrast to the age of 70 for most Civil Service employees who had rendered at least 15 years of service 6/. However appellants are able to cite only one brief exchange during the floor debate in which Rep. Rogers articulates a vague and speculative reason for the retirement age being set at sixty-five.

In actuality, in its discussions concerning the Foreign Service Act of 1924, Congress did not focus on the issue of mandatory retirement, much less at what

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5/ Act of May 24, 1924, 43 Stat. 140.

6/ Act of May 22, 1920, 41 Stat. 614.

age it should be instituted. Rather it concentrated on legislating certain procedures and inducements to obtain well qualified Foreign Service officers. 7/ To this end it formulated a statement of the following four fundamental purposes:

"1. The adoption of a new and uniform salary scale with a modest increase in the average rate of compensation.

"2. An amalgamation of the Diplomatic and Consular Service into one Foreign service [with officers serving in either] on an interchangeable basis.

"3. Representation allowances for the purpose of eliminating, or at least of lessening, the demands on the private means of ambassadors and ministers...

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7/ Representative Linthicum stated, "Individuals and corporations may continue to outbid the Government on the question of salaries, but, through the retirement system, the increase of salary, the advantages of educational and social features of the foreign service, I believe we will be able to hold our men and that they will feel satisfied to make this their life work, thereby affording the Government men of exceptional training, ability and experience." 65 Cong. Rec. 7570 (1924).

"4. A retirement system based upon the principles of the [C]ivil [S]ervice [R]etirement and [D]isability [A]ct of May 22, 1920, but administered entirely separately therefrom." H.R. REP.NO. 157, 68th Cong., 1st Sess. 2(1924).

The necessity for these changes lay in the inadequacy at that time of the American diplomatic and consular service to support the expanding overseas financial and political activities of the United States. The spoils system of appointing and promoting diplomatic and consular officers had existed (with some minor reforms) from the early days of the nation until after World War I. 8/ A report of a Joint Select Committee of Congress noted as early as 1968 that the shortcomings of the Diplomatic Service included "lack of special

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8/ Arthur G. Jones, The Evolution of Personnel Systems for U.S. Foreign Affairs, A History of Reform Efforts (Carnegie Endowment for International Peace, 1965). Jones, a career Foreign Service officer, notes in his authoritative study of the development of the Foreign Service, "Reform efforts to eliminate the spoils system, provide adequate salaries and allowances and assure appointment, tenure and promotion on the basis of merit were continually frustrated." Id. at 2.

knowledge and experience, improper selection without regard to qualifications and short tenure of office." 9/

The lack of a merit system for appointing and promoting Consular Service officers had been subject to similar criticisms. The existence of salaries for consular officers, however, particularly at higher levels, meant that the tenure of consular officers tended to be of longer duration than the short tenures of unsalaried or low-salaried officers in the Diplomatic Service. The absence of any retirement plan until the Rogers Act in 1924 also encouraged consular officers to remain in their salaried posts for long periods of time and had made it hard to dislodge very senior officers. 10/

In discussing the proposals for the establishment of a retirement system, Congress focused on the institution of a pension system rather than on mandatory retirement. 11/

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9/ Jones, supra, at 4.

10/ Id. at 9.

11/ See 65 Cong.Rec. 7567, 7569, 7579 and 7584-87.

The Secretary of State, Charles E. Hughes, voiced his concern over the lack of a pension system:

What are they going to do when they come to 65 years of age, after thirty-odd years in the Service: They cannot go into anything else; they are through. There ought to be some provision for retirement allowances. H.R. REP. NO. 157, 68th Cong., 1st Sess. 16 (1924).

Indeed, the mention of a retirement age of sixty-five in the Senate Report was in the context of the cost of the pension system for officers retiring before having contributed their full amount to the fund. S. REP. NO. 532, 68th Cong., 1st Sess. 4 (1924).

It can be inferred from the legislative history of the Act that the reason for the institution of a mandatory retirement age at sixty-five was the British consular service's use of such a retirement age 12/ and Congress' desire to follow British precedent. This desire

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12/ In the British service retirement was voluntary at age 60 and compulsory at 65 unless the Government wished to continue an officer in service longer, in which case it could continue him by intervals until he was 70 years of age. For the Reorganization and Improvement of the Foreign Service of the United States: Hearings on H.R. 17 and H.R. 6357 Before the House Committee on Foreign Affairs, 68th Cong., 1st Sess. 164 (1924).

to imitate the British system is illustrated by the comments of Representative Moore of Virginia:

Everyone knows that our principal competitor among the foreign nations is Great Britain...This bill in dealing with the Diplomatic and Consular Service will merely approximate what Great Britain has found necessary in order to carry on her business with other nations. 65 Cong. Rec. 7567 (1924).

During the same debate, Representative Linthium stated:

I was speaking a moment ago about the salaries paid by Great Britain, and she is no more able to pay competent salaries than is the United States. Certainly we owe a competency to our men in the foreign service. Id. at 7568.

The sole articulated reason given by one member of Congress for the enactment of a mandatory retirement age of sixty-five -- that foreign service involves living in the tropics -- was undoubtedly not a consideration then in the collective Congressional mind. Moreover, to consider it as a basis for holding such mandatory retirement lawful today, we must consider the conditions of life in the tropics today.

While discussing the longevity of Foreign Service officers with reference to actuarial figures, Rep. Rogers stated that longevity ought to be the same for

the officers as for persons in regular walks of life except in the tropics, where men are exposed to many tropical diseases not encountered elsewhere. Id. at 163. Although not explicitly mentioned, Congress may also have had concern about the effect of heat in the tropics on those over 65 years of age. 13/

Certainly both of these concerns about the unhealthy effects of the tropics no longer have a solid base in our modern age, for the problems have been largely ameliorated by modern medicine and technology. Diseases such as smallpox, yellow fever and malaria are now preventable and treatable, and tropical heat has been conquered by air conditioning.

2. Appellants are in error in contending that Congress, in the several amendments to the 1924 Act creating the Foreign Service, has reaffirmed its assessment that the overseas work of Foreign Service officers mandates their early retirement.

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13/ Congress also provided in this legislation that each year in the tropics would count as one and 1/2 years for purposes of length of service calculation. Thus, Congress also expressed its concern about tropical climates in the formula for receiving pension benefits. Act of May 24, 1924, 43 Stat. 140, Sec. 18(k).

Appellants cite and discuss several of the amendments to the 1924 Act and argue that each of these amendments constituted a reaffirmation of an assessment by Congress that early mandatory retirement was necessary because of the effects of overseas work on Foreign Service personnel. Gov. Br. 15-19. The materials cited, however, do not support that argument. Rather they support the proposition that Congress intended to reward Foreign Service employees by providing early mandatory retirement.

The extended statement of Secretary of State Hull, while giving a detailed description of the hardships of Foreign Service officers, concludes only that such hardships indicate that early retirements should be "authorized by Law," that is, that retirement of officers who possibly were adversely affected or who were simply tired of the cited disadvantages, should be rewarded with an opportunity to retire early. Mr. Hull does not mention mandatory retirement. *Id.* at 15-16. Similarly, the report of the Committee on Retirement Policy for Federal Personnel, except for a vague reference to a lower compulsory retirement age instituted in recognition of the needs of a career service and of the disadvantages of employment abroad, discusses the reasons why Congress conferred preferential treatment of Foreign Service employees, not why it disadvantaged them with early mandatory retirement. *Id.* at 15-16.

In further support of this proposition, the amendments in 1960 which expanded the coverage of the Foreign

Service Retirement System were stated by Congress to be "designed to give recognition to the need for an earlier retirement age for career Foreign Service personnel who spend the majority of their working years outside the United States." *Id.* at 18-19. This statement implies no more than that early voluntary retirement is necessary as a reward for the disadvantages of a Foreign Service career. Finally, the language of a House Report which accompanied the 1973 amendments of the 1925 Act states that the Foreign Service Retirement System "provides more favorable conditions for retirement to compensate for some of the personal difficulties arising from overseas service." *Id.* at 196. Surely the lower mandatory retirement age, which forces participants into lower incomes ten years before their Civil Service counterparts, cannot be such a "more favorable" condition.

Not mentioned by the appellants is the legislative history of the Foreign Service Act of 1946, 60 Stat. 999, which is significant to the case at hand, for it was this Act which reduced the mandatory retirement age for Foreign Service officers from 65 to 60. However, a review of the debates and reports on this legislation reveals no Congressional finding that employees between the ages of 60 and 65 had been unable to function as effectively as their younger colleagues. Rather, the 1946 Act

was aimed at establishing a career system in which the best qualified persons, chosen through competitive examinations, entered the Foreign Service officer corps and advanced, or not, on the basis of merit. The statement of purpose of the 1946 Act affirms this conclusion; it speaks exclusively of such matters as recruitment, promotion based on merit and impartial selection of persons for important assignments.

In summary, there is nothing in the legislative history of any of the enactments of Congress from 1924 to 1978 which reveals any findings by the Congress that Foreign Service employees and other covered persons become so ill, infirm or debilitated by the conditions of their employment that a lower mandatory retirement age for them is necessary. In fact, with respect to each of these enactments, neither the State Department nor the Foreign Service itself has ever offered the Congress any evidence of instances of lessened ability or competency, any statistics of a greater number of earlier disability retirements, or any data which would indicate that the "selection out" process authorized in the Foreign Service Retirement System has not worked successfully in weeding out those members of the service who, for one reason or another, had suffered a diminution of competency in the later years of their careers. Consequently, even if Congress had made findings as to such adverse effects of Foreign Service career assignments, such findings would be no more than mere speculation or unsupported stereotyping.

3. Appellants are in error in contending that the exclusion of Foreign Service employees from the 1978 amendments to the Age Discrimination in Employment Act reveals Congressional sensitivity to the unique requirements of the Foreign Service, thereby implying that such action constituted an affirmation of the rationality of mandatory Foreign Service retirement at age 60.

It is true that, as stated by appellants, when Congress on April 6, 1978, enacted the Age Discrimination Act Amendments of 1978, Public Law 95-256, 92 Stat. 189, it excluded from the effect of that law Foreign Service mandatory retirement provisions as well as certain other such provisions. Gov. Br. 20,21. It is, however, clear from the history of this enactment that such exclusions were expedients that were accepted by the Congress solely to avoid delay of the bill because of House Committee jurisdictional demands.

H.R. 5383, 95th Cong., 1st Sess. (1977) as introduced and considered by the House Committee on Education and Labor, would have amended Section 15(a) of the Age Discrimination in Employment Act, 29 U.S.C. (Supp. V) 633a(a), to read, "Notwithstanding any other provision of Federal Law relating to mandatory retirement requirements...., all personnel actions affecting employees....in executive agencies....shall be made free from any discrimination based on age."

H.R. 5383, supra, at 5. If it had been enacted, this provision would have eliminated mandatory retirement ages not only for the general civil service but also for certain employees of the Central Intelligence Agency, the Postal Service, the Federal Aviation Agency, the Foreign Service, and a number of other federal entities. After the House Education and Labor Committee had reported the bill on July 25, 1977, the Committee on Post Office and Civil Service, which has jurisdiction over federal personnel retirement policies, requested and received permission for sequential referral of the bill to that Committee. At about the same time, the International Relations Committee expressed its intention to request a similar sequential referral of the bill based on its jurisdiction over Foreign Service personnel matters. Informal inquiries along the same line were also received by the bill's sponsors from the Armed Services Committee, which has jurisdiction with respect to employees covered by the special retirement system of the Central Intelligence Agency. It was apparent at this time to the sponsors of the bill that sequential referral of the bill to the several committees which had jurisdiction over a portion of the personnel intended to be covered by the bill, for their study, possible hearings, and reports, would have entailed months of delay and perhaps even the demise of the legislation during the 95th Congress.

Rep. Perkins, Chairman of the Committee on Education and Labor, and

Rep. Hawkins, Chairman of its Subcommittee on Employment Opportunities, wrote to Rep. Zablocki, Chairman of the Committee on International Relations, concerning H.R. 5383, and stated in part:

In an effort to expedite this legislation, we are requesting that your Committee not insist on sequential referral of H.R. 5383 pursuant to your jurisdiction over the Foreign Service with the understanding that we accept the amendment proposed by Robert Nix, Chairman of the Post Office and Civil Service Committee at such time as the House considers this measure. The Nix amendment includes Foreign Service personnel in its exemption from the effect of H.R. 5383 [to end mandatory retirement in federal employment]. 124 Cong. Rec. H 9346 (daily ed. Sep. 13, 1977).

Similarly, Rep. Pepper, principal sponsor of H.R. 5383, and its co-manager on the floor of the House of Representatives, wrote to Rep. Nix that he, as well as the leadership of the Committee on Education and Labor, was prepared to accept an amendment to H.R. 5383 prepared by Rep. Spellman which would restrict the scope of its effect to regular civil service employees "in order to expedite the bill's consideration...." Id.

When the bill was brought up for consideration on the floor of the House of Representatives, an amendment was offered by Rep. Spellman on behalf of the

Post Office and Civil Service Committee which limited the impact of H.R. 5383 to the repeal of mandatory retirement age provisions in Title 5, U.S. Code, thus excluding from its effect statutes covering certain employees of the Central Intelligence Agency, the Postal Service, the Federal Aviation Agency, the Foreign Service, and others. Still covered, however, were tens of millions of Americans in both public (local, state and federal) and private employment who would continue to be threatened with forcible, age-based retirement at an early age or at age 70 until the bill was enacted. Accordingly, the sponsors and managers of the bill decided not to oppose the Spellman amendment. It was adopted by voice vote, and was retained in the version of the bill enacted into law.

During the actual floor debate on the amendment, Rep. Pepper spoke in its favor, but made the following comment:

For the record, Mr. Chairman, I should state what might appear to be obvious: That we in the House, in debating and passing this amendment, are making no judgment whatever on the desirability of retaining the ages now established by the various statutes affected for forced retirement. 124 Cong. Rec. H 9969 (daily ed. Sep. 23, 1977).

Also having spoken in favor of the amendment, Rep. Hawkins, the principal floor manager of the bill, made the same point:

"By this action we are not reaffirming the mandatory retirement ages in the statutes applicable to these positions. The sole purpose of this agreement is to afford the committees the opportunity to review these statutes." Id.

There was no consideration given by the sponsors or managers of the bill, or by the full House of Representatives, to "the unique requirements of the Foreign Service." Gov. Br. at 20. On the other hand, it is true, as contended by appellant that the 1978 legislation demonstrated an intention to treat Foreign Service retirement issues separately from retirement issues concerning some other federal employees, but the intent to do so was exclusively based upon established and traditional lines of committee jurisdiction and responsibility, and not at all the result of any judgment as to the propriety of a mandatory retirement age of 60 for Foreign Service employees. Instead, the sponsors and managers of the legislation in the hearing of the whole House disavowed any such judgment. Accordingly, the argument made by appellant that the enactment of Public Law 95-256 supported the rational acceptance by Congress of the existing Foreign Service retirement law is totally refuted by the facts surrounding its enactment.

4. Appellants have brought forward no supporting data with respect to the capabilities of older workers in the face of the effects of

advancing age and the demands of  
the Foreign Service.

Insofar as appellants have gleaned, from fifty-four years of legislative history, statements by members of Congress or committees that seem to support the Government's argument that the unique rigors of the Foreign Service justify a lower mandatory retirement age, those statements are inconclusive, vague and wholly unpersuasive. Medical and occupational studies, competency judgment systems, or any other sort of factual underpinning for the supposed conclusions of Congress is singularly lacking.

Such data are not unavailable. In its inquiry into age-based retirement practices, the Select Committee on Aging has heard testimony about a number of studies concerning competency of older workers. Many of them were summarized in a 1977 report by the Select Committee:

Studies by the Department of Labor, the late Ross McFarland of the Harvard School of Public Health, the National Council on the Aging, and many other experts in the field indicate that older workers can produce a quality and quantity of work equal or superior to younger workers, that they have as good, and usually better, attendance records as younger workers, that they are as capable of learning new skills and adapting to changing circumstances when properly presented as younger workers, and that they are generally more satisfied with their jobs than

younger workers. In several reports on workers' abilities, the Department of Labor noted that there is more variation in ability within the same age group than between age groups. House Select Committee on Aging, 95th Cong., 1st Sess. (1977), Mandatory Retirement: The Social and Human Cost of Enforced Idleness 34 (Comm. Print).

In Weinberger v. Wiesenfeld, 420 U.S. 636, this Court, in considering the Constitutionality of certain gender-based distinctions in the Social Security Act, made clear that vague assertions of intent, even if they emanate from Congress, will not save a provision from an equal protection challenge:

"This court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been the goal of the legislation." 420 U.S. at 649, n. 16.

We submit that the purpose asserted by appellants for Section 622 is inconsistent with the goal of the legislation of which it is a part.

## II

IF THE DISTRICT COURT WAS IN ERROR  
IN FINDING THAT SECTION 632  
FAILS THE MINIMAL RATIONALITY  
TEST, THE HOLDING THAT THE  
SECTION IS UNCONSTITUTIONAL  
SHOULD NEVERTHELESS BE  
SUSTAINED, SINCE THE NATURE OF  
THE CLASSIFICATION AND THE  
INTEREST BEING PROTECTED IN  
THIS CASE JUSTIFY A HEIGHTENED  
DEGREE OF SCRUTINY IN EXAMINING  
CLAIMS OF DUE PROCESS DENIAL.

## A

Although this Court has often referred  
to a two-tiered approach to  
statutory classifications claimed  
to deny equal protection of the  
laws, that approach has not  
precluded varying degrees of  
scrutiny short of the "strict  
scrutiny" required when  
fundamental rights or suspect  
classifications are involved.

Mr. Justice Marshall, dissenting  
in Massachusetts Board of Retirement v.  
Murgia, 427 U.S. 307, commented that  
although the rigid two-tier model of  
analysis of equal protection of the

laws issues still holds sway as this  
Court's articulated description of  
such analysis, the model's two fixed  
modes of analysis, strict scrutiny and  
mere rationality, simply do not describe  
the inquiry that the Court has under-  
taken in equal protection cases. 427  
U.S. at 318. Mr. Justice White,  
concurring in judgment in Vlandis v.  
Kline, 412 U.S. 441, stated that it  
was clear that this Court did not  
employ just one or two, but a spectrum  
of standards in reviewing  
discrimination allegedly violative of  
the equal protection clause. 412 U.S.  
at 458. Mr. Justice Brennan, dissenting  
in San Antonio School District v.  
Rodriguez, 411 U.S. 1, concluded that as  
the nexus between the specific  
constitutional guarantee and the non-  
constitutional interest draws closer,  
the non-constitutional interest becomes  
more fundamental and the degree of  
judicial scrutiny applied when that  
interest is infringed on a discriminatory  
basis must be adjusted accordingly. 411  
U.S. at 62. Mr. Justice Stevens, in  
Craig v. Boren, 429 U.S. 190, wrote that  
he was inclined to believe that what has  
become known as the two-tiered analysis  
of equal protection claims does not  
describe a completely logical method but  
is rather a means this Court has employed  
to explain decisions that actually apply  
a single standard in a reasonably

consistent fashion. His suspicions were that a careful explanation of the reasons motivating particular decisions may contribute more to an identification of the standard of analysis than an attempt to articulate it in all-encompassing terms. 429 U.S. at 212.

Whether this Court has actually created an intermediate standard of analysis somewhere between the modes of strict scrutiny and minimum rationality, or has instead modified to some degree the rigidity traditionally associated with the minimum rationality standard is unimportant, so long as it is recognized, as stated by this Court in Mathews v. Lucas, 427 U.S. 495, that the Court in realms of less than strictest scrutiny may utilize something more than a "toothless" scrutiny. 427 U.S. at 510.

In several recent cases, a number of important but not constitutionally fundamental interests have triggered types of review somewhere between the strict scrutiny and minimum rationality standards. Thus, in Hampton v. Mow Sun Wong, 426 U.S. 88, a classification which resulted in ineligibility for employment in a major section of the economy was viewed as of sufficient

importance to be characterized as a deprivation of an interest in liberty, and was therefore accorded more than minimal scrutiny. In Vlandis v. Kline, supra, a governmental classification which affected the individual interest in obtaining a higher education at an affordable tuition was given increased scrutiny. Mr. Justice White, concurring in that opinion, stated, "(I)t must now be obvious, or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely that it is that mere administrative convenience and avoidance of hearings or investigations will be sufficient to justify what otherwise would appear to be irrational discriminations." 412 U.S. at 459. In United States Department of Agriculture v. Murry, 413 U.S. 508, the individual interest in receiving such subsistence benefits as food stamps was accorded more than minimal scrutiny.

Additionally, in a significant number of recent cases, classifications which this Court has refused to categorize as necessarily suspect, but which are sensitive or have some of the characteristics of suspect classifications, have been accorded heightened scrutiny. Thus, classifications based entirely on sex have received critical scrutiny. In Reed v. Reed, 404 U.S. 71, where the court was considering the

statutory preference of males over females as administrators of decedents' estates, this Court held that such a classification must rest upon some ground of difference having a fair and "substantial", not just rational, relation to the object of the legislation. And in Frontero v. Richardson, 411 U.S. 677, where this Court held unconstitutional certain federal statutes which differentiated between male and female persons claiming military benefits based on dependency, the majority of the Court refused to categorize as inherently suspect the classifications based on sex but held that the discrimination was unconstitutional on the basis of Reed v. Reed. Similarly, although illegitimacy has not been pronounced a "suspect" criterion, this Court has exercised a significantly broader scrutiny than the minimum rationality standard would demand. In Mathews v. Lucas, 427 U.S. 495, involving a federal statutory distinction between legitimate and illegitimate children respecting dependency for qualification for Social Security survivorship benefits, this Court had no difficulty in finding the discrimination impermissible on less demanding standards than strict scrutiny. This Court held that statutory presumptions of dependency enacted in aid of administrative functions are permissible and need only approximate results that would occur on a case-by-case adjudication, but their lack of precise equivalence may not exceed the bounds of

"substantiality" tolerated by the applicable level of scrutiny. 427 U.S. at 509. In Trimble v. Gordon, 430 U.S. 762, this Court reviewed the cases and acknowledged that in some cases of discrimination on the basis of legitimacy it requires stricter scrutiny than that required by the minimal rationality standard, and even though it may be less than the strict scrutiny of suspect classification cases, it is not a toothless one.

Two factors occurring either alone or in combination most frequently trigger an increase by this Court of the degree of its scrutiny over that required by the minimum rationality standard. First, increased scrutiny is accorded if the interests at stake, although not necessarily fundamental, are important or of increased value and weight, or constitute an interest in liberty. Stanley v. Illinois, 405 U.S. 645; Vlandis v. Kline, *supra*; Hampton v. Mow Sun Wong, *supra*; Bell v. Burson, 402 U.S. 535. Second, increased scrutiny is accorded if sensitive, although not necessarily suspect, criteria of classification are employed. For example, discrimination on the basis of sex is not constitutional when supported by no more substantial justification than "archaic and overbroad" generalizations or "old notions" that are more consistent with role-typing than

society has long imposed than with contemporary reality. Califano v. Goldfarb, 430 U.S. 199. See also Trimble v. Gordon, *supra*.

B.

The District Court was not required, as it did, to treat the issue as one allowing only the deferential scrutiny of the minimal rationality standard, but could properly have applied stricter scrutiny.

The District court below, after reciting the issue in the case, stated that "[s]ince neither 'fundamental' rights nor 'suspect' classes are involved here, the distinction between Civil Service and Foreign Service employees is proper if there is a rational basis to support it." That the Court meant "minimal rationality" was specified later in the decision. "The application of the 'rational basis standard'...means that the legislatively drawn distinction is presumably valid, and that its challengers have a heavy burden in proving its invalidity. On the record established in this case, the early mandatory retirement age for Foreign Service personnel cannot survive even this most minimal scrutiny." (emphasis supplied) 436 F.Supp. at 136. As authority for the District Court's conclusion that only the most minimal scrutiny was appropriate, it cited San

Antonio Ind. School District v. Rodriguez, 411 U.S. 1, and Massachusetts Board of Retirement v. Murgia, 427 U.S. 307. The San Antonio Ind. School District case involved the financing of public elementary and secondary schools in Texas, and has very little relevance to the case at hand except that this Court there held that the case was not a proper one in which to examine the State laws under standards of strict judicial scrutiny, which test is reserved for cases involving laws that operate to the peculiar disadvantage of suspect classes or impermissibly interfere with the exercise of fundamental rights or liberties. It was held, however, that to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, such disparities are not the product of a system "that is so irrational as to be invidiously discriminatory." 41 U.S. at 54,55. This would appear to countenance a more intense scrutiny than that which would seek only a minimum rationality.

The Murgia case, on the other hand, is factually more apposite. It is, however, the contention of amici curiae that Murgia does not foreclose the application of a heightened level of scrutiny in the case at hand.

Murgia involved the constitutional validity of a Massachusetts statute which mandated that uniformed police officers

of that State be retired at age fifty. The District Court had held that it was unnecessary to apply a strict scrutiny test in that case, but determined that the age classification established by the Massachusetts statutory scheme could not in any event withstand the test of rationality. This Court agreed that "rationality" was the proper standard to apply in the case, and then stated briefly the reasons for agreeing that strict scrutiny was not the proper test for determining whether the mandatory retirement provisions denied appellee equal protection. First, the right of governmental employment is not "fundamental", and second, the class of uniformed state police officers over age 50 does not constitute a "suspect" class. This Court in this connection commented that while the treatment of aged in this Nation has not been wholly free of discrimination, such persons, unlike those who have been discriminated against on the basis of race, have not experienced a history of purposeful unequal treatment or been subject to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. It was concluded that this group of over-50 police officers was therefore not in need of "extraordinary protection from the majoritarian political process." 427 U.S. at 313. This Court then went on to hold that the Massachusetts statute was "clearly" rationally related to the purpose identified by the state. 427 U.S. at 315. This relationship was

thus identified as more substantially rational than might minimally have been required. That such greater rationality was found is reflected by the following disavowal by this Court:

We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. The problems of retirement have been well documented and are beyond serious dispute. 427 U.S. at 316-317.

It thus appears reasonably clear that the right to continued public employment beyond an arbitrary age in "middle life" was viewed by this Court as an important right, but that the purposes behind the Massachusetts statute in the case of uniformed state police officers substantially justified the discrimination and therefore satisfied the heightened rationality which was required.

It is the contention of amici curiae that the right to continued employment is of such importance that its restriction justifies much more than minimum rationality scrutiny by courts in equal protection challenges. "[O]ne of the inalienable rights of freemen which our ancestors brought

with them to this country [was] the right to follow any of the common occupations of life...; it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence... This right is a large ingredient in the civil liberty of the citizen. To deny it to all but a few favored individuals, by investing the latter with a monopoly, is to invade one of the fundamental privileges of the citizen...." Butchers' Union Co. v. Crescent City Co., 111 U.S. 746, 762. "While this Court has not attempted to define with exactness the liberty ...guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes ...the right of the individual...to engage in any of the common occupations of life...." Board of Regents v. Roth, 408 U.S. 564, 572, quoting from Meyer v. Nebraska, 262 U.S. 390.

In more recent years, in Hampton v. Mow Sun Wong, 426 U.S. 88, a Civil Service regulation which denied aliens the right to hold federal jobs was considered and this Court stated, "we deal with a rule that deprives a discrete class of persons an interest in liberty...." 426 U.S. at 102, 103.

In summary, it is the contention of amici curiae that depriving any government employee of his or her job

is a significant deprivation, but one that is particularly burdensome when the person so deprived has held that job for several years and is an older person. This type of deprivation if discriminatory should be subjected to scrutiny beyond minimal rationality before being held not a denial of equal treatment of the law.

It is our further contention that persons over the age of 60, having many of the characteristics of "suspect" classifications, should be considered a sensitive discrete group and therefore entitled to heightened scrutiny when denial of equal protection is claimed. This Court, as demonstrated above, has accorded such heightened scrutiny in other non-critical classifications which have suffered past disabilities or disadvantages similar to those suffered by the elderly in our society. Thus, the role of increasingly outdated stereotypes in gender discrimination legislation has been held impermissible when such stereotypes do not accurately reflect ability (see Stanley v. Illinois, 405 U.S. 645; Stanton v. Stanton, *supra*). Parallel stereotypes abound concerning the logical and judgmental capabilities of older people.

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<sup>14/</sup> See, e.g., Age Stereotyping and Television: Hearings Before the House Select Committee on Aging, 95th Cong., 1st Sess. (1977).

To assume that persons beyond middle age are incapable of performing effectively in positions requiring only intellectual and logical abilities simply because some persons of like age may have such incapacity is to condemn by stereotype. Similarly, although the elderly may not have suffered such a history of purposeful unequal treatment as to command extraordinary protection from the majoritarian political process (see Rodriguez, supra, 411 U.S. at 28), as have certain other minorities, they have suffered and continue to suffer significant adverse discrimination in the area of employment. Congress expressly found when it passed the Age Discrimination in Employment Act of 1967, that

- (1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment when displaced from jobs;
- (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
- (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing;

and their employment problems grave;

- (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce. 29 U.S. Code, Sec. 621 (a); 81 Stat. 602.

That such disadvantages persist was recognized by Court in Murgia, supra, as noted above, where the Court expressly did not "make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual ...." 427 U.S. at 316.

When both factors, an "important" right and a "sensitive" classification, are present, the justification for increased scrutiny is even more apparent. See, for example, Hampton v. Mow Sun Wong, supra, where the classification was aliens and they were deprived of the right of federal civil service employment; and Stanley v. Illinois, supra, where the classification was unwed fathers and they were deprived of their right to child custody. We submit that depriving the class of elderly persons of their right to continued employment is within this group of situations.

C.

Viewed with any degree of heightened scrutiny, Section 632 fails the

test of acceptable rationality.

It would appear that the approach when analyzing cases not involving strict scrutiny, but deserving of some heightened level of scrutiny, is one adjusting the applicable level of scrutiny to match the Court's assessment of the weight and value of the individual interests involved. See, e.g., Vlandis v. Kline, *supra*, 412 U.S. at 459. It is therefore appropriate to articulate the relative weight and value of the interests of Foreign Service personnel that are adversely affected by mandatory retirement at age 60.

Although a great many of those affected perform clerical and other duties not peculiar to either the Foreign Service or overseas locations, appellants stress the high-level functioning of many Foreign Service Officers in arguing the need to create "room at the top" through early mandatory retirement Gov. Br. 28-29. For these top-level officers, the specific education, training and experience acquired over a period of years will serve little purpose when, perhaps for the first time in many years, the Officer is thrown onto the private job market, with few positions requiring consular and diplomatic skills. These disadvantages are severe, especially when coupled with the normal reluctance of employers to hire any strangers who are 60 years old and therefore within the societal stereotype of persons with diminishing abilities, lost adaptability,

forgotten initiative and imagination, and even failing judgment. Additionally, the psychological shock experienced in moving from a position of great responsibility, diversity and prestige, such as career positions just below that of career ambassador or career minister, to the vacuum of unemployment, must be a devastating blow. In other words, depriving Foreign Service personnel of their right to continued employment in their arduously won specialities after age 60 must be the taking of an "important" right, one that has considerable "weight and value." Surely this right is more important and valuable than the right of young men between the ages of 18 and 20 to drink 3.2% beer in Oklahoma, which was viewed in Craig v. Boren, *supra*, to be deserving of more critical scrutiny than that required under the minimum rationality standard.

The Foreign Service Act also has as objectives the temporary appointment to the Foreign Service of representative and outstanding citizens who possess special skills and abilities, and the permanent appointment of persons to the highest positions in the Service on the basis of demonstrated ability. 22 U.S. Code, sec. 801(6), (7). Nevertheless, the retirement system is one in which the annuity is computed on the basis of total number of years of service credit which the member has earned. Thus persons temporarily or permanently appointed to advanced positions at a

time when they had otherwise acquired special skills and abilities, at the age of perhaps 40 to 45, are able because of the mandatory retirement provision to earn only a relatively small annuity before being forced to return to non-Service pursuits. This would appear to be not only most disadvantageous to such persons but also, because of the impediment it must place in the path of recruitment of such individuals, a result contrary to the best interest of the Foreign Service itself.

This Court has not defined any type of scrutiny that is less than "strict" and yet more than that required under the minimal rationality standard. Perhaps such a definition is unnecessary because of the infeasibility of constructing an all-inclusive definition, even undesirable if we are to insure appropriate responses to differing situations. Therefore, as suggested by Mr. Justice Stevens in the recent case of Craig v. Boren, supra, this brief will assume that an "explanation of the reasons motivating particular decisions may contribute more to an identification of that standard [an intermediate standard] than an attempt to articulate it in all encompassing terms." 429 U.S. at 212.

In Hampton v. Mow Sun Wong, supra, this Court, after discussing several minor reasons that justification for the discrimination at issue in that case was

unacceptable, stated,

Of greater significance, however is the quality of the interest at stake. Any fair balancing of the public interest in avoiding the wholesale deprivation of employment opportunities caused by the Commission's indiscriminate policy, as opposed to what may be nothing more than a hypothetical justification, requires a rejection of the argument of administrative convenience in the case. (emphasis supplied) 426 U.S. at 115-116.

This language is almost perfectly apposite to this case. The significant public interest in avoiding the extensive deprivation of employment opportunities for the several thousand persons under the Foreign Service retirement system caused by their mandatory retirement at age 60, must be balanced against the justification put forward by appellants that such mandatory retirement is rationally related to the government interests (1) in creating advancement opportunities for younger people and (2) in removing persons not possessing the vitality necessary to carry out overseas assignments due to the effects of aging (436 F.Supp. at 136). Under this approach, instead of determining the minimum rationality of the government justifications for the early retirement, they must be given their merited weight and value so as to be fairly balanced

against the weight and value of the countervailing interests that are involved. We submit that in any such balancing process, the scales must tip in favor of the right of Foreign Service employees to continue employment in their hard-won specialities.

Massachusetts Board of Retirement v. Murgia, supra, is readily distinguishable from this case. In Murgia the persons affected, uniformed police officers, were charged with repeated and immediate duties of protecting persons and property and maintaining law and order, so that the general relationship between advancing age and decreasing physical ability to respond to the demands of the job was highly relevant and entitled to substantial weight. As was discussed in our previous argument, the assertion that there is a similar relationship between advancing age and decreasing intellectual and judgmental ability to respond to the demands of Foreign Service has not only not been proved but is at best based upon outmoded stereotypes of persons over 60. The history of membership of this Court fully belies the existence of any such relationship.

Mr. Justice Marshall in Murgia was apparently speaking for the full Court when he commented, 427 U.S. at 327, note 8, that:

The Court's conclusion today does not imply that all mandatory

retirement laws are constitutionally valid. Here the primary state interest is in maintaining a physically fit police force, not a mentally alert or manually dexterous work force. That the Court concludes it is rational to legislate on the assumption that physical strength and well-being decrease significantly with age does not imply that it will reach the same conclusion with respect to legislation based on assumptions about mental or manual ability. Accordingly, a mandatory retirement law for all government employees would stand in a posture different from the law before us today.

Appellants argue that the principal purpose supporting the rationality of differing retirement ages for Foreign Service and Civil Service personnel is the removal from service of those whose fitness had diminished to an unacceptable level because of age and service. In support of its contention, they cite equivocal and in some cases irrelevant events in the legislative history of Foreign Service Act provisions. As we pointed out in the previous argument, several references made by appellants to debates about retirement ages and pensions are fully consistent with Congress having been primarily concerned with assuring adequate income and benefits to retired Foreign Service

personnel.

Similarly, appellants' contention that the early mandatory retirement age contributes to an abler Foreign Service is lacking in substantiation. Nowhere in the legislative history of the Act is there factual support for this premise. As noted above, it is only in recent years that Congress has begun to focus on the rationale behind mandatory retirement ages, and the consequence has been significant liberalization.

In summary, it is urged that this Court view the instant case as one requiring scrutiny more strict than that permitted under the minimal rationality standard and hold therefore that the attempted showing of rationality by the appellant does not meet the requirements of such heightened scrutiny.

# CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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